

ORIGINAL

DOCKET FILE ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED

SEP 28 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
Federal-State Joint Board on)
Universal Service)
Western Wireless Corporation)
Petition for Preemption of)
An Order of the South Dakota)
Public Utilities Commission)

CC Docket No. 96-45

**REPLY COMMENTS OF THE SOUTH DAKOTA INDEPENDENT
TELEPHONE COALITION**

The South Dakota Independent Telephone Coalition (SDITC) hereby responds to Western Wireless Corporation's (Western Wireless) opposition to SDITC's petition asking the Commission to reconsider and/or clarify its Declaratory Ruling¹ concerning the interpretation of Section 214(e)(1) of the Communications Act.

In its Petition for Reconsideration, SDITC demonstrates that the Declaratory Ruling is an improper ruling at this time because it effectively adjudicates the merits of an issue that the Commission denies is before it -- namely, a decision by the South Dakota Public Utilities Commission (South Dakota PUC) which denied eligible telecommunications carrier (ETC) status to Western Wireless; it only selectively engages the record developed in the South Dakota proceeding; and it lacks the undisputed factual basis in the record which the Commission must have before it issues a declaratory ruling. Western Wireless opposes these arguments on the basis that the Commission's Declaratory Ruling addresses a purely legal issue concerning the interpretation of Section

¹ Declaratory Ruling, CC Docket No. 96-45, FCC 00-248 (released Aug. 10, 2000).

No. of Copies rec'd 0114
List A B C D E

214(e)(1) and that it does not address the facts surrounding the provision of service by Western Wireless or any other carrier or the decision of the South Dakota PUC.²

Accordingly, Western Wireless concludes that the Commission was correct to issue a Declaratory Ruling.

Western Wireless' argument highlights why the Declaratory Ruling is inappropriate. The determination of whether a carrier should be granted ETC status is dependent on the facts concerning the carrier's provision of service and it is the state commission's duty to thoroughly examine those facts. The Commission should not prejudice or attempt to hamstring state commission review of the facts surrounding an ETC request by this Declaratory Ruling.

In addition, as discussed by SDITC in its Petition for Reconsideration, this Declaratory Ruling, which according to Western Wireless resolves a purely legal question, is necessarily of limited applicability to those cases where a state commission bases ETC designation solely on the question of whether a carrier is currently providing service to its entire service area. The South Dakota PUC's denial of Western Wireless's request for ETC status was not limited to this one issue and it is unlikely that any state commission proceeding would be so limited. This fact alone raises the question of the utility of the Declaratory Ruling. In any event, since Western Wireless argues that the Declaratory Ruling addresses a purely legal issue, it should not object to SDITC's request that the Commission clarify the limited scope of its ruling.

² Western Wireless Opposition at 6.

Western Wireless also asks the Commission to reject SDITC's request for clarification that state commissions can require supported services to be offered within a reasonable time after ETC designation. Western Wireless states that such clarification, and such a requirement, is not necessary because if the carrier does not provide universal service, "the ETC designation is virtually meaningless,"³ as the carrier will not receive support. Western Wireless argues, therefore, that the requirement that the carrier provide universal service is "self-regulating."⁴ In Appendix A to its Opposition, however, Western Wireless states that once designated, "both wireline and wireless ETCs are obligated... to extend services expediently upon request."⁵ Western Wireless goes on to state that carriers that commit to expediently extending service and "demonstrate the ability to fulfill that commitment" should be designated ETCs.⁶ Accordingly, it appears that Western Wireless in fact agrees with SDITC that carriers can be required to demonstrate that they have the ability to provide service, and that, indeed, they should be required to provide service within a reasonable time after ETC designation, as part of the ETC designation. As is plain from the South Dakota PUC's findings, and quoted extensively in SDITC's Petition for Reconsideration, Western Wireless demonstrated none of these capabilities in the South Dakota proceeding.

Moreover, and as demonstrated by SDITC in its Petition, the plain language of Section 214(e) requires an assessment of present capabilities. In its opposition, Western Wireless argues that Section 214(e)(1) cannot reasonably be interpreted as "requiring

³ Western Wireless Opposition at 10.

⁴ Id.

⁵ Id., Appendix A, at 1.

⁶ Id.

new entrants seeking ETC designation to be already providing universal service.”⁷ The South Dakota order did not require ubiquitous provisioning and SDITC is not arguing that interpretation here. However, the carrier must demonstrate the present capability to provide service. Otherwise, if carriers are required to do no more than provide an open-ended, unsupported promise to provide service, the designation process becomes meaningless. Western Wireless’ complete failure to demonstrate any present capability to provide the supported services (indeed, as noted in the South Dakota PUC’s Order, the wrong corporate applicant was before the Commission) forcefully underscores the extremely narrow circumstances as to which the Declaratory Ruling would apply, and why it should not have been issued in the first place.

⁷ Western Wireless Opposition at 4.

Based on the foregoing and its Petition for Reconsideration, SDITC respectfully requests that the Commission reconsider and/or clarify its Declaratory Ruling as discussed therein.

Respectfully submitted,

SOUTH DAKOTA INDEPENDENT
TELEPHONE COALITION

By: Richard D. Coit / RDC
Richard D. Coit
General Counsel

207 East Capitol, Suite 206
P.O. Box 57
Pierre, SD 57501
(605) 224-7629

Benjamin H. Dickens, Jr.
Mary J. Sisak
Blooston, Mordkofsky, Jackson & Dickens
2120 L Street, NW
Suite 300
Washington, DC 20037
(202) 659-0830

Dated: September 28, 2000

CERTIFICATE OF SERVICE

I, Althea B. Pierce, do hereby certify that on this, the 28th day of September, 2000, a copy of the reply comments was served by first class United States mail, postage prepaid, to the parties listed below:

Gene DeJordy
Vice President, Regulatory Affairs
Jim Blundell, Director of External Affairs
Western Wireless Corporation
3650 – 131st Avenue, SE, Suite 4000
Bellevue, WA 98006

Michele C. Farquhar
David L. Sieradzki
Ronnie London
Hogan & Hartson, L.L.P.
555 13th Street, NW
Washington, DC 20004

Counsel for Western Wireless
Corporation

David Cosson
Kraskin, Lesse & Cosson, LLP
2120 L Street, NW, Suite 520
Washington, DC 20037

Counsel for Project Telephone
Company and Range Telephone
Cooperative

A handwritten signature in black ink, appearing to read "Althea B. Pierce", is written over a horizontal dashed line.

Althea B. Pierce